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Summary record of the 825th meeting
Held at Headquarters, New York, on Wednesday, 28 June 2006, at 10 a.m.

Chairman: Mr. Abascal Zamora (Chairman of the Committee of the Whole) ..... (Mexico)

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The meeting was called to order at 10.15 a.m.

Finalization and adoption of legislative provisions on interim measures and the form of arbitration agreement and of a declaration regarding the interpretation of articles II (2) and VII (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*continued*) (A/CN.9/589, 592, 605, 606 and 609 and Add.1-6)

Draft legislative provisions on the form of arbitration agreement (*continued*) (A/CN.9/606)

Revised draft article 7 of the Arbitration Model Law (*continued*)

1. **The Chairman** invited the Commission to resume its consideration of paragraph 3 of revised draft article 7.

2. **Ms. Mas y Rubí Spósito** (Venezuela) said that the wording of paragraph 3 was ambiguous. Read in conjunction with paragraphs 1 and 2, it implied that there could be an exception to the condition of a written agreement; it could be taken to admit the possibility of an oral agreement. She proposed the following alternative wording: "An arbitration agreement or contract may be concluded orally, by conduct or by other reliable means of proof that manifests the will of the parties".

3. **The Chairman** stressed that the wording had already been considered at length and that there remained little time for further discussion of the matter.

4. **Mr. Boulet** (Belgium) said that, while the wording was indeed ambiguous, Belgium could accept it. He suggested that any confusion could be dispelled in the explanatory material.

5. **Mr. Sandoval López** (Chile) said that the fact of a provision having been discussed at length in the Working Group did not mean that it should be automatically approved by the Commission. The wording proposed by the representative of Venezuela clarified an otherwise confusing text. It would be difficult to submit draft article 7 to his legislature in its current form.

6. **The Chairman** acknowledged that the Commission could discuss and change any of the draft provisions. In seeking to wind up the discussion on paragraph 3, he had been guided by practical rather than legal considerations. He recalled the position taken by Mexico, which was to omit the writing requirement since it was not accepted by everyone. That was the reasoning behind the alternative proposal for draft article 7.

7. **Mr. Komarov** (Russian Federation) said that the wording proposed was a compromise which, by definition, could not wholly satisfy any of the parties. He emphasized that the text under discussion was a draft model law and that, as such, it could not be expected to fit seamlessly into all national legislative systems.

8. **The Chairman** said that, if he heard no objection, he would take it that the Commission wished to adopt paragraph 3 in its current form, it being understood that an explanation would be provided in the explanatory material.

9. *It was so decided.*

10. **The Chairman** invited the Commission to consider paragraph 4 of revised draft article 7.

11. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that, since paragraph 3 provided for "other means" of concluding a contract, paragraph 4 was an unnecessary expansion and could well be deleted in its entirety.

12. **Ms. Hwee Lian** (Singapore) asked how paragraphs 3 and 4 fitted together. It was not clear whether paragraph 4 applied to the agreement itself or to the record of its content; furthermore, the recognition of electronic records should also apply to paragraph 5. The use of the term "electronic communication" in paragraph 4 presupposed communication between the parties, and there was no such communication in the case of a record of contents. The wording should accordingly be modified.

13. **The Chairman**, retracing the history of paragraph 4, said that, in 1985, article 7 of the model law had recognized the possibility of an arbitration agreement in electronic form. In including the stipulation that the writing requirement was met by an electronic communication, the Working Group had sought to follow the UNCITRAL Model Law on Electronic Commerce. However, at its most recent meeting, it had couched that same provision language compatible with the 2005 Convention on the Use of Electronic Communications in International Contracts.

14. **Mr. Markus** (Switzerland) said that paragraph 4 overregulated the issue that the Commission was seeking to address. In trying to tally with the two aforementioned Conventions by circumscribing what was meant by "in writing", the Working Group had perhaps gone too far. He was puzzled by the wording. It defined what counted as being in writing, but paragraph 3 specified that an agreement in writing depended on its content being recorded in any form.

15. **Ms. Perales Viscasillas** (Spain) said that she agreed with the representative of Switzerland and the observer for the International Arbitration Association but did not think that the mention of electronic communication should be omitted. Electronic media had become an important reality and had to be taken into account. She suggested the addition at the end of paragraph 3 of the words ", including electronic communication" and the inclusion in the explanatory material of a reference to the 2005 Convention. She would then be in favour of the deletion of paragraph 4.

16. **The Chairman** said that there was a danger of too much reliance being placed on the explanatory material.

17. **Mr. Castello** (United States of America) recalled that, in the Working Group discussion, it had been recognized that paragraph 4 was very wordy and the possibility of cutting it down or removing it altogether had indeed been considered. However, it had been strongly felt that a modernized version of the model law had to take electronic communication into account, and in particular the relevant work already done within the United Nations. The language used had accordingly been harmonized with that used in the 2005 Convention on the Use of Electronic Communications in International Contracts. It would therefore be a mistake to delete or amend that paragraph, which built on the work of experts in the field.

18. **Mr. Boulet** (Belgium), supported by the representative of Germany, endorsed the remarks made by the representative of the United States. Arbitration agreements and electronic commerce were two separate issues and it would not be appropriate to mix them. The aim of paragraph 4 was limited to giving a technical definition of writing, while the aim of paragraph 3 was broader in that it sought to offer a more flexible definition of arbitration agreements. Paragraph 4 linked up usefully with the 2005 Convention and should therefore be retained.

19. **Ms. Mas y Rubí Spósito** (Venezuela) supported the views expressed by the representative of Switzerland. She saw no point in including definitions of "electronic communication" and "data message" in paragraph 4, as they could perfectly well find a place in other instruments.

20. **Mr. Uzelac** (Croatia) agreed with the representative of the United States but wondered whether a better formulation might not be found. He likewise questioned the appropriateness of the definitions given in the paragraph. He suggested that the paragraph should end after the words "useable for subsequent reference" and that the remainder should go into a note.

21. **The Chairman** said that notes in model laws were not generally intended for publication. Notes provided guidance for legislators and were not legally binding.

22. **Mr. Özsunay** (Turkey), supported by **Mr. Lefebvre** (Canada), said that paragraph 4 should be adopted in its entirety since it contained all the information that lawyers and business people would require to understand the question of how electronic communication could fulfil the written form requirement.

23. **Ms. Avenberg** (Sweden) agreed with the observer for the Swiss Arbitration Association that the content of paragraph 4 had already been covered in article 7, paragraph 3.

24. **Mr. Sandoval López** (Chile) favoured the retention of paragraph 4, since experience in his country had indicated that such references were useful for policymakers and legislators.

25. **Mr. Dervaird** (United Kingdom) associated himself with the comments made by the representatives of the United States and Germany and endorsed the view that readers of the provision should not have to consult other documents in order to understand the Model Law.

26. **Mr. Bellenger** (France) said that his delegation supported maintaining paragraph 4 in a modified form. The second part, beginning with the words "electronic communication", should be deleted, and readers should be referred to other instruments adopted by the Commission for the information it currently contained.

27. **Mr. Möller** (Observer for Finland) said that, while he supported the alternative proposal, if the article under consideration was maintained, paragraph 4 should remain in its current form.

28. **The Chairman** said he took it that the Commission wished to adopt article 7, paragraph 4.

29. *It was so decided.*

30. **The Chairman** invited the Commission to consider paragraph 5 of revised draft article 7.

31. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that, while paragraph 5 derived from article 7, paragraph 2, of the Arbitration Model Law, it contemplated a situation that, in his experience, had never arisen. When the paragraph had first been drafted, the form requirements had been more restrictive than those currently in place. Since article 7, paragraph 3, included reference to an agreement "recorded in any form", paragraph 5 was redundant and should be deleted.

32. **Mr. Özsunay** (Turkey) said that paragraph 5 should be adopted as it appeared in the draft because it came from article 7, paragraph 2, of the Model Law.

33. **Mr. Castello** (United States of America) said that his delegation agreed with the representative of Turkey. While an exchange of statements of claim and defence could fall within the broader category of article 7, paragraph 3, the Working Group had considered it prudent to retain paragraph 5 to ensure that no negative implications were drawn from deletion of the paragraph.

34. **Mr. Möller** (Observer for Finland) said that, on balance, his delegation supported maintaining paragraph 5.

35. **Mr. Komarov** (Russian Federation) said that paragraph 5 should remain unchanged. His delegation had seen several cases in which it had been applicable, and deleting it could create a degree of uncertainty about whether an exchange of statements continued to constitute a written arbitration agreement.

36. **Mr. Markus** (Switzerland) said that, while his delegation saw reasons for deleting the paragraph, the arguments for maintaining it were also compelling. At the very least, the word "Furthermore" should be deleted, since the paragraph provided clarification but no additional substance.

37. **The Chairman** said that some uniform terminology should be found to refer to written arbitration agreements throughout the article.

38. **Mr. Graham Tapia** (Mexico) said that his delegation supported maintaining the paragraph, subject to the editorial change the Chairman had suggested. In his experience, paragraph 5 had proved useful in several circumstances.

39. **The Chairman** said he took it that the Commission wished to adopt paragraph 5.

40. *It was so decided.*

41. **The Chairman** invited the Commission to consider paragraph 6 of revised draft article 7.

42. **Mr. Özsunay** (Turkey) said that since paragraph 6 had also been taken from article 7, paragraph 2, of the Arbitration Model Law, it should be adopted as it appeared in the draft. Moreover, the paragraph had been included in several national laws on international arbitration that were based on the Model Law.

43. **The Chairman** said he took it that the Commission wished to adopt paragraph 6.

44. *It was so decided.*

45. **The Chairman** invited the Commission to consider the alternative proposal for article 7 on the definition of arbitration agreement. Given the lack of consensus on article 7 in the Working Group, it had been proposed that the Commission should submit both the revised draft article and the alternative proposal to States.

46. **Mr. Sekolec** (Secretary of the Commission) said that, in accordance with the Commission's practice, the two texts would be entitled "Variant 1" and "Variant 2". The explanatory material would indicate the reasons for providing two options and clarify that one or the other should be adopted.

47. **Mr. Markus** (Switzerland) said that his delegation favoured the alternative proposal, since it contained no form requirement. However, the alternative proposal provided no definition of the scope and content of the arbitration clause. Since such clauses usually specified elements such as the arbitration institution, the relevant legislation, the composition of the tribunal, its seat and the language of the proceedings, that lack of definition could cause problems. Variant 1 of article 7 also had the advantage

that it provided a modern interpretation of article 2 of the 1958 New York Convention.

48. **Mr. Möller** (Observer for Finland) said that he supported the alternative proposal because it was fully compatible with the New York Convention. Both variants should be kept, however, because national legislators should be given both alternatives.

49. **Ms. Avenberg** (Sweden) said that the lack of a writing requirement had not created any problems in her country. Agreements were written in practice but, because there was no writing requirement, there were no disputes as to whether or not stipulated requirements had been fulfilled. Moreover, provisions such as those included in the first variant were not part of the Swedish legal tradition. Her delegation therefore supported the alternative proposal, and felt that both variants should be retained in the Arbitration Model Law. As noted by the observer for Finland, to do so would be consistent with the New York Convention.

50. **Mr. Martens** (Germany) said that his delegation also supported the alternative proposal. The Commission had spent a number of years trying to bring the article into line with the New York Convention. Practice had clearly shown that in modern commerce, agreements were normally concluded orally or in a form did not meet the requirement of the written form as set forth in the New York Convention. The text should therefore offer an alternative proposal which did not require the written form.

51. Germany was among those countries which had no formal writing requirement for business arbitration agreements. It experienced problems only in connection with the New York Convention, because the form requirement in practice was not always in line with the Convention, in the eyes of foreign judges. His delegation would strongly recommend that the Commission should explore ways to amend the New York Convention.

The meeting was suspended at 11.50 a.m. and resumed at 12.30 p.m.

52. **Mr. Sekolec** (Secretary of the Commission) said that it would be useful to recall article V, paragraph 1 (a), of the New York Convention, according to which the law applicable to the arbitration agreement was, unless the parties agreed otherwise, that of the place where the award was made. Therefore, if the award was made in a State party to the New York Convention that had adopted the alternative version of article 7 as proposed in document A/CN.9/606, the law of that country would govern the validity of the arbitration agreement. If there was any doubt as to whether the country had adopted the alternative text, it would be possible to refer to article 7 of the New York Convention.

53. **Mr. Graham Tapia** (Mexico) endorsed the comments made by the representative of Switzerland regarding the potential problems arising from an arbitration agreement that was only in oral form. However, his delegation did not share the concern that the alternative proposal posed a problem with respect to the interpretation or application of article II of the New York Convention, and would be willing to accept the retention of that variant if there was a consensus in favour of such a decision.

54. **Mr. Özsunay** (Turkey) said that his delegation supported the adoption of the text as it stood, since the Arbitration Model Law addressed matters of concern not only to those countries in which arbitration was highly advanced but also to those in which it was still being developed.

55. **Ms. Perales Viscasillas** (Spain) said that her delegation supported the two variants as set out in document A/CN.9/606.

56. **Mr. Komarov** (Russian Federation) said that his delegation did not support the inclusion of the alternative proposal in the Arbitration Model Law, since, although there were precedents in other model documents issued by UNCITRAL in which variant texts were given, the existence of two alternatives in the Arbitration Model Law somewhat reduced the value of those recommendations and would be problematic for States wishing to adopt the Model Law. Furthermore, the alternative proposal had not received the same level of support as revised draft article 7 during the current discussions or those in the Working Group. Moreover, such support had been expressed primarily by representatives of States whose legal systems had already opted to dispense with the written form requirement, and it was therefore natural that they should favour the alternative proposal. However, such a liberal position regarding form reflected a high degree of arbitration culture. It would be more appropriate for those countries that had not yet attained such a level of development with respect to arbitration legislation and practice to make a more gradual

transition to a similarly liberal approach, guided by the revised draft article 7 of the Arbitration Model Law, whose provisions were already considerably broad and progressive. Notwithstanding those comments, he welcomed the progressive nature of the alternative proposal, which undoubtedly deserved to be reflected either in a footnote or in the explanatory material.

57. **Mr. Uzelac** (Croatia), endorsing the comments made by the representative of the Russian Federation, said that while the alternative proposal was valuable and should be retained in some form, possibly presented as an option available to those countries sufficiently advanced to adopt it, it was questionable whether it should be incorporated as a variant text of article 7, since the existence of variants, by creating uncertainty, made it more difficult for countries to adopt UNCITRAL model legislation. The Commission should seek another way in which to express support for full freedom of form.

58. **Mr. Boulet** (Belgium) said that his representatives shared the view expressed by the delegations of the Russian Federation and Croatia that the inclusion of two possible variants under article 7 should be avoided if possible, since such inclusion reflected that no actual choice had been made. The decision as to whether an arbitration agreement should be in written form was not simply a point of detail but a fundamental issue, particularly given that under article 8, parties that had concluded such an agreement only orally would be deprived of having recourse or access to a State tribunal. The Commission should adopt revised draft article 7 in order to retain the written form requirement while making that requirement more flexible, which would also ensure that article 7 was aligned with article II of the New York Convention. It could simply indicate in its report that certain States were in favour of dispensing with the requirement.

59. **Mr. Schneider** (Observer for the Swiss Arbitration Association) said that, while he shared the concerns expressed by previous speakers regarding the existence of alternatives in the Arbitration Model Law, the situation with respect to article 7 was peculiar in that many of those present, including himself, considered the alternative proposal to present a good solution that might be of use in the future, but for specific reasons were not prepared to adopt that solution in preference to revised draft article 7.

60. The general feeling within the Swiss arbitration community was that it would be desirable to dispense with the writing requirement, and his Association's initial decision to support the revised draft article had only been in the interest of ensuring that the provision was aligned with article II of the New York Convention. It was also important to consider that a number of countries had already adopted a solution along the lines of the alternative proposal, and that those countries were unlikely to review their position in favour of revised draft article 7; indeed, it would probably be undesirable for them to do so. Given that situation, it would be wrong to convey the impression that the Commission recommended the adoption of only one solution. His delegation therefore supported the proposal to present the two variants as options of equal value. However, the Commission might need to explain its reasons for doing so and offer guidance to States wishing to adopt the new provisions but uncertain as to how to choose between the two variants.

61. **Mr. Bellenger** (France) said that his delegation was not in favour of introducing the alternative proposal, since to do so would considerably weaken the value and scope of the provisions set out under revised draft article 7, which had been formulated with the aim of reflecting current arbitral practice as closely as possible.

62. **Mr. Sandoval López** (Chile) expressed support for the retention of the two variants.

63. **The Chairman** said that there appeared to be support for retaining the two variants of article 7 and for explaining that decision in the explanatory material, which should also offer appropriate guidance. Any further comments on the matter could be made at the next meeting.

Statement by the Under-Secretary-General for Legal Affairs, The Legal Counsel

64. **Mr. Michel** (Under-Secretary-General for Legal Affairs, The Legal Counsel) said that the modernization of commercial law was a prerequisite for the growth of trade and investment, which was in turn an indispensable factor in reducing poverty, increasing well-being and supporting social stability.

65. Commercial law reform was too often overlooked in the provision of development assistance, and yet it could fundamentally support sustained development

and post-conflict recovery. Internationally, it could facilitate cross-border projects and trade, and promote international and regional economic integration. In that context, the work of the Commission paved the way for international markets and removed the less visible barriers to international trade.

66. The two main topics on the agenda of the Commission's thirty-ninth session — secured transactions and international commercial arbitration — were prime examples of areas where effective reform and modernization were essential to creating new business opportunities and ensuring stability for existing business relations. A modern secured transactions regime was vital to encouraging the expansion of credit. An effective arbitration system was often the only viable way to ensure respect for contractual obligations, without which trade and investment could not prosper.

67. Because promoting a business-friendly environment and contract discipline was essential for the stability and prosperity of societies, aspects of the Commission's work might be incorporated into the activities of the recently established United Nations Peacebuilding Commission and of the United Nations Development Group, which was composed of the main United Nations development entities and sought to provide a system-wide forum for discussion of development issues.

68. In conclusion, he said that the work of the Commission on International Trade Law was integral to the broader context of the Organization's efforts to promote progress and the well-being of all peoples, particularly peoples in developing countries. Its efforts could ultimately have profound, far-reaching and positive economic and social consequences.

The meeting rose at 1 p.m.